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No. 92-57

Supreme Court, U.S.
FILED
JUL 6 1992
OFFICE OF THE CLERK

Supreme Court of the United States

October Term, 1991

CORNELL UNIVERSITY,

Petitioner,

v.

RUSK COUNTY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WISCONSIN

PETITIONER'S APPENDIX

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TABLE OF CONTENTS

Wisconsin Court of Appeals Decision..App. 1

Circuit Court Judgment.....App. 34

Circuit Court Findings of Fact and Conclusions of Law.....App. 36

Circuit Court Transcript of Proceedings.....App. 44

Order from the Wisconsin Supreme Court.....App. 52

§70.17, Wis. Stats.....App. 54

§70.32, Wis. Stats.....App. 56

§75.14, Wis. Stats.....App. 58

§706.01 (7m), Wis. Stats.....App. 63

§70.47, Wis. Stats.....App. 64

§74.57, Wis. Stats.....App. 85

§75.12, Wis. Stats.....App. 89

§706.057, Wis. Stats.....App. 94

74 Op. Att'y Gen. 59 (1985).....App. 102

Brief In Support of Cornell University's Motion for Summary Judgment.....App. 120

Brief & Appendix of Plaintiff-Respondent.....App. 135

Petition for Review of the Decision of The Court of Appeals, District III,.....App. 156

Lien v. Simons, Unpublished Decision, (9th Cir. 1982).....App. 166

JANUARY 14, 1992

No. 91-0581

STATE OF WISCONSIN IN COURT OF APPEALS

DISTRICT III

CORNELL UNIVERSITY,

Plaintiff - Respondent,

v.

RUSK COUNTY,

Defendant - Appellant.

APPEAL from a judgment of the circuit court for Rusk county: F.A. Henderson, Judge. Reversed. Before Cane, P.J., LaRocque and Myse J.J.

MYSE, J. Rusk County appeals a declaratory judgment in favor of Cornell University. The judgment declared that privately owned mineral interests are subject to taxation separate from the surface land under sec. 70.32, Stats. The judgment further declared

that the issuance of a tax deed for the surface owner's delinquent property taxes does not extinguish the property rights of the mineral interest owner.

Rusk County asserts that the trial court erred because Wisconsin has a unitary taxing system in which the mineral interests are taxed as part of the value of the surface land and not separate from it. Rusk County next contends that when a tax deed is issued, all interests in the property are transferred to the county except those interests specifically exempted by statute. It asserts that because privately owned mineral interests are not specifically exempted by statute, a tax deed extinguishes the proprietary interest of the mineral interests of the mineral owner.

Cornell, however, argues that if we decide that Wisconsin has a unitary taxing system and that a tax deed

extinguished its ownership interest in the minerals, such a scheme violates its constitutional right to due process. We conclude that sec. 70.32, Stats., establishes a system whereby privately owned mineral interests are taxed to the surface owner as part of the total value of the property and that a tax deed extinguishes the proprietary interest of the owner of mineral rights. We also conclude that the statutory scheme establishing this process gives Cornell all the process that it is due under the constitution. Accordingly, the judgment is reversed.

The facts in this case are undisputed. Cornell owns an undivided onehalf fee simple interest in minerals in a 160-acre parcel in Rusk County. The surface land is owned by someone else. The surface owner of the property failed to pay real property taxes on the land for the years 1985 through 1989.

In 1986, pursuant to sec. 74.57, Stats., the Rusk County clerk issued a tax certificate to Rusk County for the delinquent taxes. Under the tax delinquency statutes, three years from the issuance of the tax certificate, Rusk County could apply for a tax deed that would transfer ownership of the land to it. Accordingly, in 1989 Rusk County applied for a tax deed and issued a written Notice of Application for Tax Deed to Cornell and the surface owner.

Subsequent to the filing of the notice, the surface owner paid the 1985 taxes, thus redeeming the land and avoiding the issuance of a tax deed for the 1985 tax liability. However, tax certificates for the years 1986, 1987 and 1988 remain outstanding, making the property subject to the issuance of a tax deed based upon nonpayment of taxes for those particular years.

Initially, Cornell University brought this suit seeking both injunctive and declaratory relief. The intervening payment of the 1985 taxes made the injunctive relief unnecessary. However, because of the delinquent taxes for 1986, 1987 and 1988, the portion of the action seeking declaratory relief proceeded. Cornell asked the court to declare that(1) privately owned mineral interests are subject to taxation separate from the surface land; and (2) a tax deed issued for delinquent property taxes does not divest the mineral interest owner of his rights in the land. The trial court agreed and granted relief to Cornell. It is this declaratory judgment that Rusk County appeals.

First, we address whether privately owned mineral interests are subject to taxation separate from the tax assessed against the surface land. Wisconsin's

constitution has vested its taxing power in the legislature. Article VIII, § I of the Wisconsin Constitution states:

> The rule of taxation shall be uniform but the legislature may empower cities, villages, or towns to collect and return taxes on real estate located therein by optional methods. Taxes shall be levied upon such property with such classifications as to forests and minerals including or separate or severed from the land, as the legislature shall prescribe.

Therefore, we must examine the statutes to determine if the legislature has classified mineral interests in such a manner that they are subject to separate taxation from the land.

The resolution of this issue involves statutory interpretation. Statutory interpretation presents a question of law that we review de novo. State v. Michels, [4] Wis.2d 81, 87, 414 N.W.2d 311, 313 (Ct. App. 1987). When interpreting a statute we first look to the language of the statute to determine if it is ambiguous. Section 70.32, Stats., sets up the manner in which property taxes will be assessed. It provides:

> Real property shall be valued by the assessor in the manner specified in the Wisconsin property assessment manual provided under s. 73.03(2a) from actual view or from the best information that the assessor can practicably obtain, at the full value which could ordinarily be obtained therefor at private sale.

In determining the value the assessor shall consider, as to each piece, its advantage or disadvantage of location, quality of soil, quantity of standing timber, water privileges, mines, minerals, quarries, or other valuable deposits known to be available therein, and their value; but the fact that the extent and value of minerals or other valuable deposits in any parcel of land are unascertained shall not preclude the assessor from affixing to such parcel the value which could ordinarily be obtained therefor at private sale. If on the assessment date occurring in 1957 or in any year thereafter any person other than a governmental unit of Wisconsin

> owns real estate in which a Wisconsin governmental unit has retained mineral rights, timber rights or an easement or any similar interest in such real estate, the value of any such retained right shall be eliminated in determining the assessable value of such property, and such retained interest shall be excepted in the assessment description of such land and in any notice, tax certificate or tax deed following any such assessment. (Emphasis added.)

The county argues that this statute clearly sets up a unitary taxing system with respect to land and mineral interests except in the case where the government is the owner of the mineral rights.

There is no question that sec. 70.32, Stats., standing alone, unambiguously establishes a unitary taxing scheme. Schmidt v. Town of Almon, 181 Wis.244, 194 N.W. 168 (1923). In Schmidt, the property owner protested payment of the portion of taxes on her land that were attributable to the standing timber. The timber rights were owned by another person. The taxpayer argued that the person who owned the timber rights should have the duty to pay the taxes attributable to the timber. The court rejected this argument stating:

> Section 70.32 prescribes the method to be followed by the assessor in the valuation of the real estate, and the elements of value to be taken into consideration in arriving at the assessment. Among such elements is the existence of standing timer

> upon the land. When such valuation shall be fixed as a result of a compliance with the provisions of section 70.32, the assessment must be levied as a unit against the real estate, and the timber itself constitutes but an element of the value of the real estate proper, namely, the land. So that...a legislative intent is made manifest for the assessment of land as a unit, and not for a separate assessment against the owner of standing timer.

Id. at 247, 194 N.W. at 169.

Cornell, however, directs our attention to sec. 706.057(2)(d), Stats., which provides a procedure for the establishment and lapse of mineral interests. The statute provides that a mineral interest is "used"

if "property taxes are paid on the interest in minerals by the owner of the interest in minerals." Cornell argues that this statute acknowledges a separate tax to be assessed against mineral interests.

It is possible for an ambiguity to be created by the interaction of two separate statutes. In re Walker's Estate, 75 Wis.2d 93, 102, 248 N.W.2d 410. 414 (1977). "Statutes relating to the same subject matter are to be construed together and harmonized." State v. Burkman, 96 Wis.2d 630, 642, 292 N.W.2d 641, 647(1980).

Cornell, however, offers us no way to harmonize the idea contained in sec.706.057(2)(d), Stats., with sec. 70.32, Stats. It merely argues that the legislature evinced its intent to tax minerals separately by enacting sec. 706.057(2)(d).

We conclude that the only way to harmonize these statutes is to read them in the manner offered by the county. Rusk County submits that sec. 706.057(2)(d), Stats., contemplates protection of an owner of mineral interest who contracts with the surface property owner to pay the taxes attributable to the mineral interests on the property. Such an agreement, once complied with, would protect the mineral interest owner from having his rights lapse due to non-use. Thus, the county argues that there is no conflict between this idea and the unitary tax system set forth in sec.70.32, Stats.

The county's reconciliation of these two statutes is supported by Schmidt. The court suggested in Schmidt that the property owner contract with the owner of the timber interests to recover that promotion of the

taxes attributable to the value of the timber. The court recognized that:

> Those engaged in the lumbering industry, as a rule, had no occasion to use the land itself excepting in so far as it was necessary in the removal of the timber, and the owners of the naked lands therefore realized...that provision should be made for an assumption on the part of the purchaser of the timber of a reasonable share of the taxes, and so the subject here involved generally has become and is now recognized as a proper basis for a contract relation.

Id. at 252, 194 N.W. at 170. Based on the language of the statutes and the reasoning in Schmidt, we conclude that sec.

706.057(2)(d), Stats., does no more than protect an owner of mineral interests, who enters into such a contract to pay property taxes to the surface owner, from lapse of his interest due to non-use.

Cornell attempts to distinguish Schmidt, claiming that there is a fundamental difference between the nature of timber interests and mineral interests. In its brief, Cornell argues:

> The crucial distinction between timber rights and mineral interests is that timber rights, in whatever from, represent an interest in land that is subordinate to the fee interest of the surface owner, while a mineral interest owner has a fee simple interest in the minerals, and such real property interest is distinct

from and not subordinate to the fee interest in the surface land.

This distinction, assuming that it is a valid one, has no significance to our analysis. The question is whether the legislature chose to tax timber and mineral interests in different manners. Under sec. 70.32; Stats., the legislature answers this question by grouping mineral interests in the same category as timber interests for purposes of taxation.

In addition, Cornell argues that because mineral interests are defined in sec. 706.01(7m), Stats., as "fee simple" interests, they must be assessed separately from the surface land as "real property" under sec. 70.32, Stats. To interpret the statutes otherwise, asserts Cornell, would render sec. 706.01(7m) superfluous. We are not persuaded.

The definition of mineral interests serves purposes other than those associated with tax collection. The fee simple interest in minerals enables a person to record, inherit, or otherwise convey interests in minerals. See Chicago & N.W. Transp. v. Pedersen, 80 Wis.2d 566, 571, 259 N.W.2d 316, 319(1977). Therefore, we conclude that our interpretation of sec. 70.32, Stats., is consistent with sec. 706.01(7m), Stats., and does not render it superfluous.

We conclude that the legislature established a unitary taxing scheme under sec. 70.32, Stats. In Schmidt, the court expressed the inherent difficulties that would arise if timber interests were to taxed separately. It stated:

> To require a separate tax to be levied on the standing timber would create a situation whereby

> the collection of a tax in many instances would become impossible. Large portions of the timber interests in this state have been held by nonresidents, and where the timber, by such nonresidents, is caused to be removed from the land, an enforcement of the collection of the tax would often be utterly impossible.

Id. at 249-50, 194 N.W. at 169-70. This observation is equally applicable to mineral interests. Therefore, before we will conclude that the legislature intended to significantly alter the manner in which property taxes are assessed in Wisconsin, we require a more unequivocal statement from the legislature. We will not use implications drawn from two other statutes to create the result that does not appear in the plain language of sec. 70.32.

Next, we address whether a tax deed issued in connection with a tax delinquency proceeding against the surface property owner divests the mineral interest owner of his rights in the property. Section 75.14(1), Stats., governs this question. It provides in relevant part:

> If any land subject to a tax certificate shall not be redeemed the county clerk shall...execute...to the county...a deed...and shall acknowledge the same which shall vest in the county an absolute estate in fee simple in such land subject, however, to recorded restrictions and redemption as provided in this chapter....

Therefore, only those interests specifically exempted in the statutes from operation of a tax deed are not transferred to the county

upon issuance of a tax deed. See Leciejewski, v. Sedlak, 116 Wis.2d 629, 342 N.W.2d 734(1984).

In Leciejewski, the court considered whether the title the plaintiffs acquired from the county following a tax lien foreclosure, defeated the defendant's claim of ownership based on adverse possession that arose prior to the judgment of foreclosure. The court concluded that the plaintiff's title defeated the defendant's adverse possession ownership claim. The court explained that "[a] tax deed is not derivative, but creates a new title that extinguishes all former titles and liens not expressly exempted from its operation." Id. at 639, 342 N.W.2d at 739. Because mineral interests are not expressly exempted in the statutes from the operation of a tax deed, the owner of such interests is divested of his rights upon issuance of a tax deed.

Because we conclude that in Wisconsin a tax deed extinguishes the mineral interest owner's proprietary interest, we must next address whether the unitary tax system offends constitutional due process guarantees because it could divest the mineral interest owner of his rights due to nonpayment of taxes by the surface property owner. Cornell asserts that Wisconsin's statutory scheme violates both procedural and substantive due process.

"While all statutes are presumed to be constitutional, the presumption of constitutionality of a tax statute is the strongest." Woodward Communications v. DOR, 143 Wis.2d 512, 523, 422 N.W.2d 137, 141 (Ct. App. 1988). The burden is on the challenger to prove unconstitutionality beyond a reasonable doubt. Lasarkis v. City of Wisconsin Dells, 131 Wis.2d 525, 533, 389 N.W.2d 67, 71 (Ct. App. 1986).

"Establishing doubt as to an act's constitutionality is insufficient." Woodward, 143 Wis.2d at 523, 422 N.W.2d at 141.

First, we address Cornell's claim that the statutes relating to the issuance of a tax deed deny it procedural due process. Procedural due process requires that a party whose rights may be affected by government action be given "an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." Neylan v. Vorwald, 124 Wis.2d 85, 90, 368 N.W.2d 648, 651 (1985) (quoting Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 246 (1944).

Cornell does not argue that the notice procedure is deficient. In addition, Cornell received actual notice of the application for issuance of a tax deed in

this case. Therefore, we do not address the constitutionality of the statutory notice procedure in the issuance of a tax deed.

Cornell argues that it has no meaningful opportunity to be heard. It asserts that the statutes do not provide a hearing for it to contest the issuance of the deed or the nonpayment of real estate taxes. However, the right to a hearing does not necessarily have to come from a statute. Cornell has the right, at common-law, to various remedies before the state can deprive it of its property interest. As evidenced in sec. 75.61, Stats., tax statutes in Wisconsin contemplate the use of such common-law procedures. Section 75.61 provides a time limitation on various types of actions related to tax certificated including "every action or proceeding to set aside any inclusion of land in a tax certificate for the nonpayment of taxes, or

to cancel any tax certificate, or to restrain in the issuing of any tax certificate, or tax dds, for any error or defect going to the validity of the assessment, and affecting the groundwork of such tax, or on account of any void or defective special assessment ...." The existence of these remedies adequately provides Cornell with an opportunity to be heard on factors central to the issuance of the tax deed and defeats Cornell's procedural due process challenge.[1]

Next, we address Cornell's argument that the unitary tax system violates substantive due process requirements by providing that the mineral interest owner's rights in the property are extinguished when

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[1]We do not consider whether the procedures that come before the application for a tax deed provide Cornell with adequate due process because that issue was not raised or briefed.

the surface owner fails to pay the property taxes. We first note that the Wisconsin Constitution specifically authorizes the legislature to tax mineral interests as one with the land if it so chooses. Wis. Const. art. VIII, § I. Therefore, no substantive due process challenge lies under the Wisconsin Constitution because the legislature has done exactly what it is constitutionally authorized to do.

We must, however, still look to the federal constitution to determine whether Wisconsin's unitary tax scheme and enforcement procedures violate federal substantive due process. The test for substantive due process is whether the statutes have a reasonable and rational relationship to their purpose, and whether the purpose is a proper one. Oliver v. Travelers Ins. Co., 103 Wis.2d 644, 647, 309 N.W.2d 383, 385 (Ct. App. 1981).

Section 70.32, Stats., provides the manner in which property taxes will be assessed in Wisconsin. Section 75.14, Stats., challenged by Cornell as unconstitutional, is designed to facilitate property tax collection. There is no dispute that property tax collection is a proper purpose that the government is entitled to pursue.

Remaining, then, is the question whether sec. 75.14. Stats., has a reasonable and rational relationship to its purpose. We conclude that it does. The legislature set up a system whereby one value is assigned to the entire property for tax assessment purposes regardless of the number of separately owned interests that may exist. The surface property owner is the person against whom this entire value is assessed. The state holds the surface owner responsible for the payment of taxes and

then leaves it up to the individual owners of various interests to decide and provide amongst themselves for the division and apportionment of these taxes and to pursue relief against the owners of the other interests when necessary.

Cornell argues that the state is constitutionally required to assess each interest in the property separately and effect collection against each separate owner. The complexities and difficulties that accompany such a system were articulated by the court in Schmidt. Id. at 249-50, 194 N.W. at 169-70. The timber rights on one piece of real estate might be owned by one person, while the mineral rights are owned by another, the water rights by another, and the surface land by yet another. The procedure set up by the state merely shifts the burden of allocating the proper share of taxes to the individual

owners of a single piece of real estate. This system was designed to avoid the complexities that would exist if separate assessments against each interest were made. Because this procedure bears a reasonable and rational relationship to the enforcement of property tax collection, we conclude that the state is not constitutionally required to maintain the system suggested by Cornell.

Cornell also has the ability to protect its interest in the property, both prior to and after application for issuance of the tax deed, by paying the delinquent property taxes, thus redeeming the property. See sec. 75.01(1)(b), Stats. Cornell argues that it is too burdensome to require it to pay the property taxes in their entirety to protect its interest. This scheme is no more burdensome than the surface property owner's duty to pay the taxes attributable to the mineral interests in the first

instance, and that scheme was found to be valid in Schmidt.

Moreover, as the state points out:

> [T]he Fourteenth Amendment does not in terms or in effect prohibit unwise taxes, merely because they are unwise, or unfair or burdensome taxes, merely because they are unfair or burdensome. The wisdom or fairness of the tax before us are not matters subject to our control or revision. We are only concerned with the power of the state to lay the tax.

3M Co. v. Wisconsin Dept. of Taxation, 322 U.S. 435, 444 (1944). Hence, we do not review the wisdom of the legislature's scheme.

In addition, Cornell has the ability to lessen the burden or unfairness, as discussed earlier, by contracting with the

surface owner to apportion property taxes and guarantee their payment. See Schmidt; see also Lasarkis. Such a contract would increase the array of remedies available to Cornell.

In Lasarkis, the city enacted an ordinance that empowered the city to execute a lien against an owner's property where a tenant's electric bill was not paid. Despite the plaintiff's argument that the ordinance made the owner an unwilling collection agent for the utility and an involuntary guarantor of the tenant's electric bill, the court held that such a result was not improper and ultimately upheld the ordinance as constitutional. The court reasoned that the landlord could insist on a rental agreement with the tenants to ensure payment of electric bill. Id. at 537-38, 389 N.W.2d at 72-73. Similarly, a mineral interest owner can at

the time of acquisition or reservation of mineral rights or any time thereafter, negotiate an agreement with the surface property owner to guarantee the payment of property taxes.

We do not foreclose the possibility that additional common-law remedies may exist which the mineral interest owner who pays the entire [sic] property taxes in order to protect his interest in the property may pursue against the surface property owner. However, we need not decide that question here because we conclude that the rights available to Cornell already enumerated sufficiently satisfy due process.

Finally, we address Cornell's assertion that Doherty v. Rice, 240 Wis. 389, 3 N.W.2d 734 (1942), requires a contrary result. Because of a decisive difference between Doherty and this case, Doherty does not control. In Doherty, the court discussed

the idea that if an easement were cut off by a tax sale of the servient estate, the owner of the dominant estate would be deprived of his property without due process. Id. at 400, 3 N.W.2d at 738. The court based its assertion on the fact that easements were excluded from the assessment of the servient estate. Thus, property rights that were not assessed in a piece of real estate could not be sold for delinquent taxes. See Tax Lien Co. v. Schultze, 106 N.E. 751, 752 (N.Y. 1914) (relied on by the court in Doherty). Here, however, mineral rights are included in the assessment of the real estate. Section 70.32, Stats. Therefore, Doherty is inapposite.

Cornell also cites Lien v. Simons, 522 F. Supp. 712 (D. Mont. 1981), in support of its position. However, it can be distinguished on the same basis as Doherty. After concluding that Montana does not tax

mineral interests, the court found that it would be unconstitutional for a deed obtained through a tax sale to extinguish the mineral interest owner's rights. Mineral interests are taxed in Wisconsin, therefore Lien does not affect our analysis.

Due to the strong presumption of constitutionality we afford to tax statutes, the state's legitimate interest in assessing a single piece of real estate as one unit and the remedies available to an aggrieved owner of a separate interest in the real estate, we conclude that Wisconsin's unitary tax system
and tax deed enforcement procedure comply with substantive due process.

By the Court.--Judgment reversed.

Recommended for publication in the official reports.

STATE OF WISCONSIN:CIRCUIT COURT:RUSK COUNTY

CORNELL UNIVERSITY,

Plaintiff,

v. Case No. 90-CV-25

RUSK COUNTY,

Defendant.

JUDGMENT

IT IS HEREBY ADJUDGED that the interest in minerals owned by Cornell University in the 320-acre parcel constituting the East One-Half of Section Nine (9), Township Thirty-Three (33) North, Five (5) West in Rusk County as recorded in the Register of Deeds Office of Rusk County on November 1, 1902 at Volume 6, Pages 161 through 166 and Volume 6, Page 563 and as further evidenced by a Statement of Mineral Claim recorded in the Register of Deeds Office of Rusk County

on June 11, 1987 as Volume 246 of Records, Pages 6 through 11 as Document No. 216627 is not and cannot be extinguished upon the issuance of a tax deed based upon the failure of the surface interest holders to pay taxes as assessed and levied by Rusk County.

Dated this 10th day of December, 1990.

/s/ Frederick A. Henderson
Frederick A. Henderson
Presiding Judge

CIRCUIT COURT:STATE OF WISCONSIN:RUSK COUNTY

CORNELL UNIVERSITY,

Plaintiff,

v. Case No. 90-CV-25

RUSK COUNTY,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WHEREAS, the Plaintiff has filed a Motion for Summary Judgment; and

WHEREAS, the matter has been briefed by the Plaintiff and the Defendant; and

WHEREAS, a hearing was held in open court on October 29, 1990.

NOW THEREFORE, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Cornell University is a corporation existing under the laws of the State of New York. Its principal place of business is located in Ithaca, New York. Cornell University's business includes the operation and management of an institution for higher education.

2. Rusk County is a municipal corporation organized under the laws of the State of Wisconsin.

3. Cornell University owns various mineral interests in Rusk County, Wisconsin. These mineral interests are evidenced by a Statement of Mineral Claim recorded in the Register of Deeds Office of Rusk County on June 11, 1987 in Volume 246 of Records, Pages 6 through 12 as Document No. 216627.

4. The mineral interests owned by Cornell University were originally created through a reservation of mineral rights in a

land contract recorded in the Register of Deeds Office of Rusk County on November 1, 1902, Volume 6, Pages 161 through 166 and a subsequent Warranty Deed recorded at Volume 6, Page 563.

5. One of the parcels for which Cornell University owns mineral interests is a 320 acre parcel constituting the East One-Half of Section Nine (9), Township Thirty-Three (33) North, Five (5) West in Rusk County. With respect to that 320 acre parcel, Cornell owns an undivided one-half interest in the minerals.

6. The owners of the surface rights with respect to the Northeast Corner of Section Nine (9), Township Thirty-Three (33) North, Five (5) West are Dwayne and Marilyn Huffman ("Huffman parcel"). That corner includes 160 acres of the 320-acre parcel for which Cornell University owns an undivided one-half interest in all of the

mineral which have been or may be discovered on the parcel.

7. At no point in time has Rusk County separately assessed the value of Cornell University's mineral interests for the purposes of taxing that interest. Rusk County has at no time levied a tax on Cornell University's property interest in the mineral rights beneath the Huffman parcel or notified Cornell University that any taxes were due with resect to those property interests.

8. Cornell University received a Notice of Application for Issuance of Tax Deed dated December 29, 1989 from Rusk County with respect to the Huffman parcel.

9. The Notice was the first notice Cornell University received that any taxes were outstanding and unpaid with resect to the surface ownership of the Huffman parcel.

10. The Treasurer of Rusk County pursuant to Section 74.33 Wis. Stats. prepared and published a notification of a public auction selling off the Huffman parcel due to real estate taxes being delinquent for tax year 1985. The real estate taxes were also delinquent for tax year 1985. The real estate taxes were also delinquent for 1986, 1987 and 1988. Rusk County was the successful bidder at the tax sale and received a tax certificate providing that Rusk County would be entitled to a deed of conveyance of the Huffman parcel three years from the date of such certificate.

11. Pursuant to Section 75.12 Wis. Stats., the tax deed may not be issued until a written Notice of Application is served upon the owners of record. Since the Notice of Application for Issue of Tax Deed was sent by Rusk County on December 29, 1989,

Cornell University believed that Rusk County could and would seek the issuance of a tax deed on or after March 29, 1990.

12. Although taxes for the year 1985 subsequently were paid, there is a present controversy with resect to whether Cornell's interest in minerals which are separate from the surface interests in the Huffman parcel can and should be extinguished by a tax deed based upon the failure of the surface interest holder to pay taxes as assessed and levied by Rusk County.

CONCLUSIONS OF LAW

1. Interest in minerals which are separate from the fee simple interests in the surface of the land and which are created by an instrument transferring, granting as signing or reserving the minerals are, pursuant to Section 706.01(7)(m) Wis. Stats., fee simple interests and constitute real property.

2. As real property, interests in minerals as defined in Section 706.01(7)(m) Wis. Stats. are subject to separate taxation under Section 70.32 Wis. Stats.

3. The laws of Wisconsin recognize two discrete fee simple interests: that of the surface owner and that of the owner of the interest in minerals.

4. The fact that a surface owner may be in default of his/her property tax obligation does not defeat or affect the fee of the owner of the interest in minerals beneath the surface. To rule otherwise could constitute a violation of constitutional protection.

5. Accordingly, Cornell University is entitled to summary judgment declaring that its interest in minerals which are separate from the surface rights in the Huffman parcel cannot be extinguished or otherwise affected by the issuance of a tax deed based

upon the failure of the surface interest holder to pay taxes as assessed and levied by Rusk County. A judgment consistent with this shall be entered without costs being assessed against either party.

Dated this 10th day of December, 1990.

BY THE COURT

/s/ Frederick A. Henderson
Frederick A. Henderson
Circuit Court Judge

STATE OF WISCONSIN:CIRCUIT COURT:RUSK COUNTY

CORNELL UNIVERSITY,

Plaintiff,

v. Transcript of Proceedings

Case No. 90-CV-25

RUSK COUNTY,

Defendant.

At the Rusk County Courthouse, Circuit Courtroom on October 29, 1990.

* * * * *

THE COURT: Well this is an action for declaratory judgment. The plaintiff Cornell University seeks to have its right declared based upon a number of statutes.

In the State of Wisconsin, the first statute that we have to look at is 706.01, and Chapter 706 is entitled conveyances of real property; recording; titles.

706.01(7m) says, Interest in Minerals, means any fee simple interest in minerals beneath the surface of land which is (a) separate from the fee simple interest in the surface of the land; and (b) created by an instrument transferring, granting, assigning, or reserving the minerals. I have to conclude from that statute that at least in Wisconsin an interest in minerals that is separate from the fee simple interest in the surface rights on the parcel of land where the minerals exist is real property. So what we have here is Section 706.01 declaring that mineral rights are fee simple and that makes them real property. I think that is the only conclusion that I can arrive at, and I think that is the conclusion that the plaintiff Cornell University assets, and I think they're correct.

Taking at look at that then, for looking at 706.057 applies only to those owners who own severed interest in mineral rights. 706.057 subparagraph 1 is entitled, "applicability", and it says that this section does not apply to an interest in minerals which is owned by the same person who owns the fee simple interest in the surface of the land above the interest in minerals. And that seems to make sense to me. If you look at that statute in conjunction with the property tax statute 70.32 entitled real estate, how valued, where you have the owner of the fee simple and the surface rights go to the same owner of any minerals on that parcel of land, you really don't have any problems, you don't have to worry too much about taking the minerals separate, because it's the same one that is going to pay the tax bill anyway. And I think that 70.32 recognizes that when

it says that in determining the value the assessor shall consider, as to each piece, its advantage or disadvantage of location, quality of soil, quantity of standing timber, water privileges, mines minerals, quarries, or other valuable deposits known to be available therein, and their value; and there is a laundry list of factors that an assessor may use or it says shall use, but everything except minerals in that laundry list would be easily determined as to value. Quality of soil, for example, that can be tested and qualified. Disadvantages or advantage of location you have a number of people in the appraisal business that can testify as to that. Quantity of standing timber that is something that also can be measured. If there is a mine on the property you can certainly go down and look at the mine and find Number 1 that there is a mine there,

and Number 2 the extent and value of that operation. The same thing with a quarry. But when you are talking about minerals that sometimes is not the easiest thing to determine because it is all underground, and you would have to have some type of diagnostic equipment that would allow you to Number 1 ascertain what type of value and mineral, if any exists on the subsurface, and Number 2 the quantity or extent of those valuable minerals. That's not exactly an easy thing to do unless you're in the business as a mining company, or an oil exploration type company that uses a geologist or what have you. But even in those particular companies I think there is a question or guess and b'gosh involved in that, and I think that the drafter of the statute has recognized that when they add to that laundry list a caveat that says but the fact that the extent and value of minerals

or other valuable deposits in any parcel of land a unascertained shall not preclude the assessor from affixing to such parcel the value which would ordinarily be obtained therefor at private sale. And that gives the assessor the authority to go ahead and make an assessment, and I think that just allows the assessor to say look we're not going to worry about it. We have the ability to do it if we want to, but for reason of cost or expenses we're not going to do it. We're not going to add that ingredient into the value of the property taxes. Now Mr. Anderson argued well the state has a Unitarian type of tax procedure. I think that once you find, and I don't know how we can not find this fee simply interest in minerals is real property, real estate just as the surface rights are, then you have got a taxation system in place. It's the same one that they tax the surface

rights with, and I'm satisfied that the statutes in Wisconsin recognize that severed interests in minerals gives to the owner of that interest the ownership of those minerals in fee simple. So it's the same thing as owning the surface rights. They're both real property. The fact that one is owned by one person and the surface rights are owned by the other or another person it seems to me that if you assume that, and I don't know that a tax deed on the surface rights were or would defeat the severed mineral rights, but even if you assumed that you would have an unconstitutional tax of property in violation of the 5th and 14th amendments, and that being the case I will grant summary judgment for Cornell University and direct that Mr. Busch prepare the findings of fact and conclusions of law consistent with my opinion.

MR. BUSCH: Thank you.

THE COURT: Anything else?

MR. ANDERSON: Nothing.

MR. BUSCH: No. I'll prepare the order.

THE COURT: We're adjourned.

(WHEREUPON THE PROCEEDINGS WERE CONCLUDED)

CERTIFICATE

* * * * *

Dated this 3rd day of June, 1991.

/s/ Bradley W. Huff

Bradley W. Huff, Reporter

Rusk County Circuit Court

Rusk County Courthouse

Ladysmith, WI 54848

Office of the Clerk

SUPREME COURT

231 E. STATE CAPITOL

P.O. BOX 1668

MADISON, WISCONSIN 53701-1688

TELEPHONE 608-266-1880

To: April 7, 1992

Hon. Frederick A. Henderson

Rusk County Circuit Court

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You are hereby notified that the Court has entered the following order:

No. 91-0581 Cornell University v. Rusk County L.C. #90CV25

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of plaintiff-respondent-petitioner Cornell University, and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

Marilyn L. Graves

Clerk of Supreme Court

§70.17, Wis. Stats.

70.17 Lands, to whom assessed; buildings on exempt lands. (1) Real property shall be entered in the name of the owner, if known to the assessor, otherwise to the occupant thereof if ascertainable, and otherwise without any name. The person holding the contract or certificate of sale of any real property contracted to be sold by the state, but not conveyed, shall be deemed the owner for such propose. The undivided real estate of any deceased person may be entered to the heirs of such person without designating them by name. The real estate of an incorporated company shall be entered in the same manner as that of an individual. Improvements on leased lands may be assessed either as real property or personal property.

(2) All lands which have been or may be contracted for sale by any county shall be assessed and taxed to the parties contracting therefor.

§70.32, Wis. Stats.

70.32 Real estate, how valued. (1) Real property shall be valued by the assessor in the manner specified in the Wisconsin property assessment manual provided under s. 73.03 (2a) from actual view or from the best information that the assessor can practicably obtain, at the full value which could ordinarily be obtained therefor at private sale. In determining the value the assessor shall consider, as to each piece, its advantage or disadvantage of location, quality of soil, quantity of standing timber, water privileges, mines, minerals, quarries, or other valuable deposits known to be available therein, and their value; but the fact that the extent and value of minerals or other valuable deposits in any parcel of land are unascertained shall not preclude the assessor from affixing to such parcel the value which could ordinarily be

obtained therefor at private sale. If on the assessment date occurring in 1957 or in any year thereafter any person other than a governmental unit of Wisconsin owns real estate in which a Wisconsin governmental unit has retained mineral rights, timber rights or an easement or any similar interest in such real estate, the value of any such retained right shall be eliminated in determining the assessable value of such property, and such retained interest shall be excepted in the assessment description of such land and in any notice, tax certificate or tax deed following from any such assessment.

§75.14, Wis. Stats.

75.14 Deeds, execution of; rights under; evidence. (1) If any land subject to a tax certificate shall not be redeemed the county clerk shall, after the expiration of the time prescribed by law for the redemption thereof, on presentation of the tax certificate and proof of service of notice, execute in the name of the state and of the county, as such officer thereof, under the clerk's hand and the seal of the county, to the county and its assigns, a deed of the land so remaining unredeemed, and shall acknowledge the same which shall vest in the county an absolute estate in fee simple in such land subject, however, to recorded restrictions and redemption as provided in this chapter; and such deed duly witnessed and acknowledged shall be presumptive evidence of the regularity of all the proceedings, from the valuation of the land

by the assessor up to and including the execution of the deed, and may be recorded with the like effect as other conveyances of land. No deed may be issued under this section until the county board, by resolution, orders issuance of the deed.

(2) The county clerk shall not issue a deed of any parcel of land until by carefully comparing the advertised list of the same for redemption with the tax certificate, the clerk shall find that the description of such parcel of land so to be conveyed has been correctly and fully published, in such advertised list of redemptions; and if upon such examination the county clerk shall find any error or omission in any such advertised description the clerk shall enter opposite the description of said land in the tax certificate a statement of the fact of such error or omission. If the description of

said land in the tax certificate is in error, the county board shall cause such certificate to be canceled, as it related to that parcel, and direct the county treasurer to correct the description thereof, using the procedure under s. 74.61, and include the parcel in the tax certificate next issued under s. 74.57. If the error or omission is in only the advertised list of redemptions, the county treasurer shall correct and readvertise the same for redemption in the next such publication and the period of redemption shall be extended thereby an additional year.

(4) Whenever a deed in the chain of title shall contain valid and enforceable restrictions and covenants running with the land, as hereinafter defined and limited, said restrictions and covenants shall survive and be enforceable after the issuance of a tax deed to the same extent

that they would be enforceable against a voluntary grantee of the owner of the title immediately prior to the delivery of the tax deed. This subsection shall apply to the usual restrictions and covenants limiting the use of property, the type, character and location of building, covenants against nuisances and what the former parties deemed to be undesirable conditions, in, upon and about the property, covenants to contribute to the cost of maintaining private roads, and other similar restrictions and covenants; but this subsection shall not protect covenants creating any debt or lien against or upon the property, or that will require the owner to expend money for any purpose, except such as may require the owner to keep the premises in a sightly condition, contribute to the cost of maintaining private roads, or to abate undesirable conditions. During the period

that the county is the owner of lands so acquired it shall not be required to expend any money to keep the premises in sanitary or sightly condition or to contribute to the cost of maintaining private roads or to abate nuisances or undesirable conditions, but its successors in title shall be subject thereto and to covenants and restrictions as provided in this section. Any rights the former owner had to enforce the restrictions and covenants and restrictions as provided in this section. Any rights the former owner had to enforce the restrictions and covenants to which this subsection is applicable against the grantor and other parties owning property subject to such restrictions and covenants, except forfeitures, right of reentry, or reverter, shall likewise survive to the county as grantee in said tax deed and to successors and assigns.

§706.01 (7m), Wis. Stats.

706.01 Scope, definitions, construction.

(7m) "Interest in minerals" means any fee simple interest in minerals beneath the surface of land which is:

(a) Separate from the fee simple interest in the surface of the land; and

(b) Created by an instrument transferring, granting, assigning or reserving the minerals.

§70.47, Wis. Stats.

70.47 Board of review proceedings. (1) TIME AND PLACE OF MEETING. The board of review shall meet annually at any time during the 30-day period beginning on the 2nd Monday of May. In towns and villages the board shall meet at the town or village hall or some place designated by the town or village board. If there is no such hall, it shall meet at the clerk's office, or in towns at the place where the last annual town meeting was held. In cities the board shall meet at the council chamber of some place designated by the council and in cities of the 1st class in some place designated by the tax commissioner of such cities. A majority shall constitute a quorum except that 2 members may hold any hearing of the evidence required to be held by such board under subs. (8) and (10), if the requirements of sub. (9) are met.

(2) NOTICE. Notice of the time and place of meeting shall be posted by the clerk in at least 3 public places in the taxation district and on the door of the village hall, council chambers or city hall if the place of meeting has been otherwise designated.

(2m) OPEN MEETINGS. All meetings of the board of review shall be publicly held and open to all citizens at all times. No formal action of any kind shall be introduced deliberated upon or adopted at any closed session or meeting of a board of review.

(3) SESSIONS. (a) At its first meeting, the board of review shall receive the assessment roll and sworn statements from the clerk and prior to adjournment shall be in session at least one day from 10 a.m. to 4 p.m., except for a one hour recess for lunch, for taxpayers to appear and

examine the assessment roll and other assessment data and be heard in relation to the assessment. If the assessment roll is not completed, the board shall adjourn for such time as is necessary to complete the roll, and shall post a written notice on the outer door of the place of meeting stating to what time the meeting to adjourned. with respect to the assessment rolls of taxing districts prepared by a county assessor, the board of review as constituted under s. 70.99 (10) shall schedule meetings in each taxing district on specific dates beginning with the 2nd Monday of April and shall be in session on the specified dates from 10 a.m. to 4 p.m., except for a one hour recess for lunch, for taxpayers to appear and examine the assessment roll and other assessment data and be heard in relation to the assessment. Notice of the time and place of meeting shall be posted in advance by the

clerk of the taxing district in at least 3 public places and on the door of the village hall, council chambers or city hall or the town hall on the date set by the board of review.

(b) The municipal governing body may be ordinance or resolution designate hours, other than those set forth in par. (a), during which the board shall hold its first meeting, but not fewer than 4 hours on the first meeting day between 8 a.m. and 12 p.m. such change in the time shall not become effective unless notice thereof is published in the official newspaper if in a city, or posted in not less than 3 public places if in any other municipality, at least 10 days before such first meeting.

(4) ADJOURNMENT. the board may adjourn from time to time until its business is completed. If an adjournment be had for more than one day, a written notice shall be

posted on the outer door of the place of meeting, stating to what time said meeting is adjourned.

(5) RECORDS. The clerk shall keep a record in the minute book of all proceedings of the board.

(6) BOARD'S DUTY. The board shall carefully examine the roll or rolls and correct all apparent errors in description or computation, and shall add all omitted property as provided in sub. (10). the board shall not raise or lower the assessment of any property except after hearing as provided insubs. (8) and (10).

(7) OBJECTIONS TO VALUATIONS. (a) Objections to the amount or valuation of property shall first be made in writing and filed with the clerk of the board of review prior to adjournment of public hearings by the board. If the board is in session 5 days, including

its first meeting and any adjourned meetings, all objections shall be filed within such time unless failure to file within such time is waived by the board upon a showing of good cause for such failure. The board may require such objections to be submitted on forms approved by the department of revenue. No person shall be allowed in any actio nor proceedings to question the amount or valuation of property unless such written objection has been filed and such person in good faith presented evidence to such board in support of such objections and made full disclosure before said board, under oath of all of his property liable to assessment in such district and the value thereof. The requirement that it be in writing may be waived by express action of the board.

(aa) No person shall be allowed to appear before the board of review or to contest the amount of any assessment of real or personal property if the person has refused a reasonable written request by certified mail of the assessor to view such property.

(ab) For the purpose of this section, the managing entity, as defined in s. 707.02 (15), or its designees, may be considered the taxpayer as an agent for the time-share owner, as defined in s. 707.02 (31), and may file one objection and make one appearance before the board of review concerning all objections relating to a particular real property improvement and the land associated with it. A time-share owner may file one objection and make one appearance before the board of review concerning the assessment of the building unit in which he or she owns a time share.

(b) Upon receipt of an objection, the board shall establish a time for hearing the objection. At least 48 hours' notice of the time of hearing must be given to the objector or his attorney, and to the municipal attorney and assessor. Where all parties are present and waive such notice in the minutes, the hearing may be held forthwith.

(bb) Upon receipt of an objection with respect to the assessment rules of taxation districts prepared by a county assessor the board of review as constituted under s. 70.99 (10) may direct such objection to be investigated by the county board of assessors if such board has been established under s. 70.99 (10m). If such objection has been investigated by the county board of assessors as provided by s. 70.99 (10m), the county board of review may adopt the determination of county board of assessors

unless the objector requests or the board of review orders a hearing. At least 2 days' notice of the time fixed for such hearing shall be given to the objector or his attorney and to the corporation counsel. If the county board of review adopts the determination of the county board of assessors and no further hearing is held, the clerk of the board of review shall record the adoption in the minutes of the board and shall correct the assessment roll as provided by s. 70.48.

(8) HEARING. The board shall hear upon oath all persons who appear before it in relation to the assessment, and on such hearing shall proceed as follows:

(a) The clerk shall swear all persons testifying before it in relation to the assessment.

(b) The owner or his representatives and his witnesses shall first be heard.

(c) The board may examine under oath such persons as it believes have knowledge of the value of such property.

(d) It may and upon request of the assessor shall compel the attendance of witnesses and the production of all books, inventories, appraisals, documents and other data which may throw light upon the value of property.

(e) All proceedings shall be taken in full by a stenographer or by a recording device, the expense thereof to be paid by the district. The board may order that the notes be transcribed, and in case of an appeal or other court proceedings they shall be transcribed. If the proceedings are taken by a recording device, the clerk shall keep a list of persons speaking in the order in which they speak.

(f) The clerk's notes, written objections and all other material submitted

to the board of review, tape recordings of the proceedings and any other transcript of proceedings shall be retained for at least 7 years, shall be available for public inspection and copies of these items shall be supplied promptly at a reasonable time and place to anyone requesting them at the requester's expense.

(9) CORRECTION OF ASSESSMENTS. (a) From the evidence before it the board shall determine whether the assessor's valuation is correct. If too high or too low, it shall raise or lower the same accordingly. A majority of the members of the board present at the meeting to make the determination shall constitute a quorum for purposes of making such determination, and a majority vote of the quorum shall constitute the determination. In the event there is a tie vote, the assessor's valuation shall be sustained.

(b) A board member may not be counted in determining a quorum and may not vote concerning any determination unless, concerning such determination, such member:

1. Attended the hearing of the evidence; or

2. Received the transcript of the hearing no less than 5 days prior to the meeting and read such transcript; or

3. Received a mechanical recording of the evidence no less than 5 days prior to the meeting and listened to such recording; or

4. Received a copy of a summary and all exceptions thereto no less than 5 days prior to the meeting and read such summary and exceptions. In this subdivision "summary" means a written summary of the evidence prepared by one or more board members attending the hearing of evidence, which summary shall be distributed to all board

members and all parties to the contested assessment and "exceptions" means written exceptions to the summary of evidence filed by parties to the contested assessment.

(10) ASSESSMENT BY BOARD. If the board has reason to believe, upon examination of the roll and other pertinent information, that other property, the assessment of which is not complained of, is assessed above or below the general average of the assessment of the taxation district, or is omitted, the board shall:

(a) Notify the owner, agent or possessor of such property of its intention to review such assessment or place it on the assessment roll and of the time and place fixed for such hearing in time to be heard before the board in relation thereto, provided the residence of such owner, agent or possessor be known to any member of the board or the assessor.

(b) Fix the day, hour and place at which such matter will be heard.

(c) Subpoena such witnesses as it deems necessary to testify concerning the value of such property and, except in the case of an assessment made by a county assessor pursuant to s. 70.99, the expense incurred shall be a charge against the district.

(d) At the time appointed proceed to review the matter as provided in sub. (8).

(11) PARTIES. In all proceedings before the board the taxation district shall be a party in interest to secure or sustain an equitable assessment of all the property in the taxation district.

(12) NOTICE OF DECISION. Prior to final adjournment, the board of review shall provide the objector, or the appropriate party under sub. (10), notice by personal delivery or by mail, return receipt required, of the amount of the assessment as

finalized by the board and an explanation of appeal rights and procedures under sub. (14) and s. 70.85, 74.35 and 74.37. Upon delivering or mailing the notice under this subsection, the clerk of the board of review shall prepare an affidavit specifying the date when that notice was delivered or mailed.

(13) CERTIORARI. Except as provided in s. 70.85, appeal from the determination of the board of review shall be by an action for certiorari commenced within 90 days after final adjournment of the board. The action shall be given preference. If the court on the appeal finds any error in the proceedings of the board which renders the assessment or the proceedings void, it shall remand the assessment to the board for further proceedings in accordance with the court's determination and retain jurisdiction of the matter until the board

has determined an assessment in accordance with the court's order. For this purpose, if final adjournment of the board occurs prior to the court's decision on the appeal, the court may order the governing body of the assessing authority to reconvene the board.

(14) TAX PAYMENTS. In the event the board of review has not completed its review or heard an objection to an assessment on real or personal property prior to the date the taxes predicated upon such assessment are due, or in the event there is an appeal as provided in sub. (13) and s. 74.37 from the correction of the of review to the court, the time for payment of such taxes as levied is the same as provided in ch. 74 and if not paid in the time prescribed, such taxes are delinquent and subject to the same provisions as other delinquent taxes.

(15) SAVING CLAUSE. Nothing herein contained shall be construed to alter or repeal any of the provisions of s. 70.35.

(16) FIRST CLASS CITY, FILING OBJECTIONS, PROCEEDINGS, APPEAL. (a) In 1st class cities all objections to the amount or valuation of real or personal property shall be first made in writing and filed with the tax commissioner on or before the 3rd Monday in May. No person may, in any action or proceeding, question the amount or valuation of real or personal property in the assessment rolls of the city unless objections have been so filed. The board may not waive the requirement that objections be in writing. If the objections have been investigated by a committee of the board of assessors under s. 70.07 (6), the board of review may adopt the recommendation of the committee unless the objector requests or the board orders a hearing. At

least 2 days' notice of the time fixed for the hearing shall be given to the objector or attorney and to the city attorney of the city. The provisions of the statutes relating to boards of review not inconsistent with this subsection apply to proceedings before the boards of review of 1st class cities, except that the board need not adjourn until the assessment roll is completed by the tax commissioner, as required in s. 70.07 (6), but may immediately hold hearings on objections filed with the tax commissioner, and the changes, corrections and determinations made by the board acting within its powers shall be prima facie correct. Appeal from the determination shall be by an action for certiorari commenced within 90 days after final adjournment of the board of review. The action shall be given preference.

(b) In 1st class cities if an assessment valuation for taxes based on the value of real property is the same for the current year as for the preceding year and ownership of the property is unchanged, and if an objection had been filed to the assessment valuation for the preceding year and the assessed valuation by the assessor was sustained by the board of review or the courts, an objection filed under sub. (7) to the assessment valuation on the same property for the current year shall be subject to a fee not to exceed $10 payable to the city at the time of filing the objection or within 3 days thereafter, and the fee shall be a condition for the hearing of the objection before the board of review.

(17) SUMMARY OF PROCEEDINGS. After the board of review has completed its determinations, the clerk shall prepare a summary of the proceedings and

determinations, on forms prescribed by the department of revenue, which shall include the following information:

(a) Name of taxpayer;

(b) Description or designation of the property subject to the objection;

(c) Amount of the assessment about which taxpayer objected;

(d) Names of any persons who appeared on behalf of taxpayer; and

(e) Board's determination on taxpayer's objection.

(18) TAMPERING WITH RECORDS. (a) Whoever with intent to injure or defraud alters, damages, removes or conceals any of the items specified under subs. (8) (f) and (17) may be fined not more than $1,000 or imprisoned not more than 2 years or both.

(b) Whoever intentionally alters, damages, removes or cancel as any public notice, posted as required by sub. (2),

before the expiration of the time for which the notice was posted, ,may be fined not more than $200 or imprisoned not more than 6 months or both.

§74.57, Wis. Stats.

74.57 Issuance of tax certificate. (1) ISSUANCE. Annually, on August 15, the county treasurer shall issue to the county a tax certificate which includes all parcels of real property included in the tax roll for which real property taxes, special charges, special taxes or special assessments remain unpaid.

(2) EFFECT. (a) Issuance of a tax certificate commences the redemption period on all real property included in the tax certificate unless s. 74.59 (2) applies.

(b) Two years after the issuance of the tax certificate, unless s. 74.59 (2) or 75.03 applies, the county is entitled, as to any property included in the tax certificate which has not been redeemed, to do any of the following:

1. Take a tax deed under s. 75.14

2. Commence an action to foreclose the certificate under s. 75.19.

3. Commence an action to foreclose the tax lien represented by the certificate under s. 75.521.

(3) CERTIFICATE NOT TRANSFERABLE. The county may not sell, assign, or otherwise transfer a tax certificate. However, if a city authorized to act under s. 74.87 pays delinquent taxes under an agreement entered into under s. 74.83, the county treasurer shall issue or reissue tax certificates to the city on all property for which the delinquent taxes have been paid.

(4) FORM. (a) The tax certificate shall group by taxation district all parcels for which real property taxes, special assessments, special charges or special taxes remain unpaid.

(b) Unless it is issued by a city authorized to act under s. 74.87, the tax certificate shall:

1. Contain a legal description of each parcel of property.

2. For each parcel, state the amount of the unpaid real estate taxes, special assessments, special charges or special taxes and the date from which the interest and any penalty accrue.

3. State the earliest date upon which the county may be entitled to a tax deed or equivalent evidence of title.

(c) The format of the tax certificate shall be prescribed by the department of revenue under of revenue under s. 70.09 (3).

(d) If a parcel of property is redeemed after the tax certificate is issued, the date on which the property was redeemed shall be noted on the certificate, together

with the amount for which the property was redeemed.

(5) CERTAIN LANDS EXEMPT. This section does not apply to public lands held on contract, lands mortgaged to the state or lands subject to s. 74.65.

§75.12 Wis. Stats.

75.12 Deed, notice of application for. (1) No tax deed shall be issued on any lot or tract of land subject to a tax certificate unless a written notice of application for tax deed shall have been served upon the owner, or one of the owners of record in the office of register of deeds of the county wherein the land is situated. If such lot or tract be improved by a dwelling house, or building used for business purposes, or a building used for agricultural purposes, and in any of said cases, such building has been actually occupied for the purpose specified for 30 days immediately prior to the date of service of the notice of application for tax deed, or if such lot or tract of land has been occupied and cultivated for agricultural purposes for 30 days within the period of 6 months immediately prior to the date of service of the notice of application

for the tax deed, then notice of application for tax deed shall be served upon the occupant or one of the occupants thereof. If the records of the office of register of deeds in the county where such land is situated show that such lot or tract of land is incumbered by an unsatisfied mortgage or mortgages, such notice of application for tax deed shall be served upon at least one of the mortgagees in each such mortgage, or upon the last assignee or one of the last assignees of each such mortgage, if the assignment is recorded.

(2) Such notice shall state the date of the tax certificate, the description of the lands involved, the amount of the delinquency and that such amount will bear interest and penalty as provided by law, and shall give notice that after the expiration of 3 months from the date of service of such notice the county will apply for a tax deed.

A notice of application for a tax deed shall not be served earlier than 88 days prior to the earliest date on which the county is entitled to a deed.

(3) The notice of application for tax deed may be served by the county treasurer or any person acting for the treasurer. The notice shall be served in the manner that service of a summons in a court of record is made, or by certified mail, with return receipt of the addressee only demanded. If notice cannot be given by use of either of the foregoing methods, the county treasurer of the treasurer's agent shall make an affidavit setting forth the effort to make service, the inability to do so, and shall file the affidavit with the county clerk. In such cases the notice shall be published by the county treasurer as a class 3 notice, under ch. 985, in the county. The affidavit of the county treasurer or the treasurer's

agent as to inability to secure service personally or by certified mail, together with proof of publication of the notice, shall be deemed completed service of the notice of application for tax deed.

(4) Before the tax deed is issued, proof of service, or the returned certified mail receipt, or proof of publication of the notice of application for tax deed shall be filed with the officer authorized by law to issue the tax deed, and a copy of the proof of service, returned certified mail receipt, or proof of publication with evidence of the cost of publication shall be retained by the county treasurer. A person subsequently redeeming a lot or tract of land, or any part or interest therein, shall pay in addition to the amount required to redeem the lot or tract, $1.50 for each person served with the notice or, if notice is sent by certified mail, the cost of sending any

notices by certified mail, plus the cost of publication of the notice. If there is no occupant of the lands as hereinbefore defined, the county treasurer shall file an affidavit to that effect with the officer authorized by law to issue the tax deed.

(6) No tax deed shall be taken upon any notice of application therefor after one year from the last date of service of such notice.

(7) This section shall supersede all provisions of law, including the provisions of any city charter, which are in conflict with it.

§706.057, Wis. Stats.

706.057 Lapse and reversion of interests in minerals.(1) APPLICABILITY. This section does not apply to an interest in minerals which is owned by the same person who owns the fee simple interest in the surface of the land above the interest in minerals.

(2) USE OF AN INTEREST IN MINERALS. In this section, an interest in minerals is used if any of the following occur:

(a) Any minerals are mined in exploitation of the interest in minerals.

(b) A conveyance of mineral interest is recorded under this chapter.

(c) Any other conveyance evidencing a transaction by which the interest in minerals is created, aligned, reserved, mortgaged or assigned is recorded under this chapter.

(d) Property taxes are paid on the interest in minerals by the owner of the interest in minerals.

(e) The owner of the interest in minerals records a statement of claim under sub. (4) or (5) concerning the interest in minerals.

(3) Lapse. (a) Except as provided in par. (b) or (c), and interest in minerals lapses if the interest in minerals was not used during the previous 20 years.

(b) An interest in minerals which was not used during the 20-year period prior to July 1, 1984, does not lapse if the interest in minerals is used within 3 years after July 1, 1984.

(c) An interest in minerals which was used during the period from 17 to 20 years prior to July 1, 1984, does not lapse if the interest in minerals is used within 3 years after July 1, 1984.

(4) STATEMENT OF CLAIM: RECORDING: REQUIREMENTS. If the owner of an interest in minerals uses the interest in minerals by recording a statement of claim, the statement of claim shall comply with this subsection. The statement of claim shall contain the name and address of the owner of the interest in minerals, a description of the location and boundary of the interest in minerals and a reference to the recorded instrument which created the interest in minerals. The statement of claim shall be recorded with the register of deeds for the county in which the interest in minerals is located.

(5) CURE OF LAPSE. The lapse of an interest in minerals under sub. (3) is cured if the owner of the interest in minerals records a statement of claim complying with all of the requirements of sub. (4) before the surface owner records a statement of

claim under sub. (6) (a) or before a statement of claim takes effect under sub. (6) (b) 1, whichever is later.

(6) CLAIM OF LAPSED INTEREST IN MINERALS. (a) The owner of the land under which an interest in minerals exists may claim that portion of a lapsed interest in minerals which lies beneath the owner's land by recording a statement of claim. The statement of claim shall contain the name and address of the owner of the land under which the lapsed interest in minerals is located and a description of the land under which the interest in minerals is located. The statement of claim shall be recorded with the register of deeds for the county in which the land is located.

(b) 1. Except as provided in subd. 2, a statement of claim which is recorded under par. (a) before the lapse of the interest in

minerals to which the claim applies takes effect when the interest in minerals lapses.

2. A statement of claim which is recorded under par. (a) before the lapse of the interest in minerals to which the claim applies is void 6 years after the statement of claim is recorded if the interest in minerals does not lapse within that 6-year period.

(7) STATEMENT OF CLAIM; RECORDING; REGISTER OF DEEDS' DUTY. The register of deeds shall provide copies of the uniform form for statements of claim under subs. (4), (5) and (6). Upon receipt of a statement of claim under sub. (4), (5) or (6) in the office of the register of deeds, the register of deeds shall record the claim in a manner which will permit the existence of an interest in minerals to be determined by reference to the parcel or parcels of land above the interest in minerals. the

claimant shall pay the recording fee under s. 59.57.

(9) DETERMINATION OF OWNERSHIP. 9a) The owner of an interest in minerals which is the subject of a claim under sub. (6) (a), within 3 years after the claim is recorded with the register of deeds or within 3 years after the claim takes effect as provided under sub. (6) (b) 1, whichever is later, may bring an action for a declaratory judgment or declaration of interest on the ownership of the interest in minerals. The action shall be commenced in the circuit court in the county where the interest in minerals is located.

(b) 1. If the court finds that the owner of the interest in minerals used the interest in minerals within the time limits specified under sub. (3) or that the owner of the interest in minerals recorded a claim under sub. (6) (a) or before the claim took

effect as provided under sub. (6) (b) 1, whichever is later, the court shall issue a judgment declaring that the interest in minerals is not lapsed.

2. If the court finds that the owner of the interest in minerals did not use the interest in minerals within the time limits specified under sub. (3) and did not record the claim under sub. (5) before the surface owner recorded the claim under sub. (6) (a) or before the claim took effect as provided under sub. (6) (b) 1, whichever is later, the court shall issue a judgment affirming the surface owner's claim.

(c) Upon the issuance of a judgment affirming the surface owner's claim or, if no action is brought under par. (a), at the end of the 3-year period after the surface owner's claim is recorded or at the end of the 3-year period after the claim takes effect as provided under sub. (6) (b) 1,

whichever is later, the ownership of the interest in minerals reverts to the owner of the land under which the lapsed interest in minerals is located and title to the interest in minerals is merged with the title to the surface of the land.

(10) WAIVER;LIMITATION. No person may waive or agree to waive the provisions of this section and any waiver or agreement of this type is void.

Opinions of the Attorney General Vol. 74

April 11, 1985

Timothy F. Cullen, Chairperson, Senate Organization Committee

You have requested my opinion on several questions regarding the acquisition of mineral interests by counties in tax delinquency proceedings. You first ask whether a county acquires the mineral interests in property in tax delinquency proceedings in two instances: (a) where one person owns both the surface and mineral rights; and (b) where one person owns the land's surface and, by reservation or separate conveyance, another person owns the mineral interests in the same land. If the answer to (b) is yes, you further ask whether a county's acquisition of such mineral interests in a tax delinquency

proceeding without any notice to the owner of such interests constitutes a deprivation of due process of law. Finally, you ask whether section 70.32(1), Stats., is determinative of the treatment of severed mineral interests in tax delinquency proceedings, or is at odds with the ownership of a mineral interest as a fee simple estate, particularly in light of the provisions of 1983 Wisconsin Act 455, which deals with the preservation or lapse of such interest.

Your first question has already been addressed and answered by this office in several prior opinions. Those opinions have guided the decisional processes of local tax authorities without dissenting voice, either legislative or judicial, for many years. Based on those opinions, the answer to your first question in both instances (a) and (b) is yes. In tax delinquency proceedings, a

county acquires fee simple title to land, including mineral interests therein, whether severed or not.

In 25 Op. Att'y Gen. 630 (1936), an opinion which relied in part on Section 70.32(1), the general statute dealing with the valuation of real estate, the attorney general concluded that, with certain noted exceptions, where ownership of the surface of lands and the ownership of the minerals underneath are in different persons, it is very doubtful that the law permits the separate assessment of the mineral rights. Other opinions have generally concluded that when the county acquires title to lands either by a tax deed issued pursuant to section 75.14 or by a judgment in a foreclosure in rem proceeding under section 75.521, the reservation of mineral rights by a former owner is cut off and the title of the county is no longer subject to such

reservation. 49 Op. Att'y Gen. 77 (1960); 49 Op. Att'y Gen. 130 (1960). Although the above opinions made no reference to mineral interests severed by separate conveyance, the necessary implication is that such opinions apply to severed mineral interests in general.

The latter opinions rest in part on the general proposition that: "The law is well settled that a valid tax deed cuts off all former titles and liens. Sec. 75.14(1), Stats.; XX Op. Att'y Gen. 409. Jarvis v. Peck, 19 Wis. 74; Cole v. Van Ostrand, 131 Wis. 454, 465; Doherty v. Rice, 240 Wis. 389." 35 Op. Att'y Gen. 429 (1946). By virtue of sections 75.14(1) and 75.36(2), a county acquires an "absolute estate in fee simple in such land subject, however, to all unpaid taxes and charges which are a lien thereon ... ." As discussed in Leciejewski

v. Sedlak, 110 Wis. 2d 337, 348, 329 N.W.2d 233 (Ct. App. 1983):

> It has been held that the effect of a tax deed is not limited to passing that person's title in whose name the land was taxed, but is to divest all interests in the land and to vest in the grantee an independent and paramount title. [Citation.] A tax title does not connect itself with the previous chain of title, but breaks up all previous titles. [Citation.] A tax deed is not derivative, but creates a new title that extinguishes all former titles and liens not expressly exempted from its operation. [Citations.]

See also Leciejewski v. Sedlak, 116 Wis. 2d 629, 639, 342 N.W.2d 734 (1984); In Matter of Foreclosure of Tax Liens, 106 Wis.2d 244, 251-52, 316 N.W.2d 362 (1982).

Similarly, under section 75.521 a foreclosure judgment vests in the county a fee simple absolute and cuts off any "right, title, interest, claim, lien or equity of redemption ..." of any person in the land. Sec. 75.521(8), Stats. Such a provision is inconsistent with the idea that foreclosure may grant a county good title as to one person but not as to another. In Manner of Foreclosure of Tax Liens, 106 Wis.2d at 252; Leciejewski, 110 Wis.2d at 347. Section 75.521(13)(b) contains a virtually identical provision applying to the judgment entered in any contested foreclosure in rem proceeding. See 62 Op. Att'y Gen. 234 (1973).

Your second question inquires as to the due process rights of the owner of a mineral interest to notice of the taking of that interest through tax delinquency proceedings.

The answer to your second question requires an examination of 1983 Wisconsin Act 455 and the recent decision in Mennonite Bd. of Missions v. Adams, 103 S. Ct. 2706 (1983), regarding notice in tax delinquency proceedings. 1983 Wisconsin Act 455 requires that severed mineral interests be registered or otherwise used within specified time periods. If the mineral interests are not registered or otherwise used, they lapse. Newly created section 706.01(7m) reads:

"Interests in minerals" means any fee simple interest in minerals beneath the surface of the land which is:

(a) Separate from the fee simple interest in the surface of the land; and

(b) Created by an instrument transferring, granting, assigning or reserving the minerals.

This legislation is in accord with the Wisconsin Supreme Court's recognition that mineral rights are an interest in land which may be created or transferred as any other estate in land. Chicago & N.W. Transp. Co. v. Pedersen, 80 Wis.2d 566, 259 N.W.2d 316 (1977).

1983 Wisconsin Act 455 provides for the recording of mineral interest claims to reflect an estate separate from the surface fee. Newly created section 706.057(7) provides:

> Upon receipt of a statement of claim ... [under that section] in the office of the register of deeds, the register of deeds shall record the claim in a manner which will permit the existence of an interest in minerals to be determined by reference to the parcel or parcels of land above the interest in minerals.

Thus, the Legislature intends that owners of separate fee simple interests in minerals registered pursuant to 1983 Wisconsin Act 455 have legally protected property interests.

Published notice of the time limit for redeeming specifically described lands sold for taxes is required in all delinquent tax proceedings. Secs. 75.07 and 75.09, Stats. Holders of registered mineral interests would receive such notice. However, newspaper publications alone may no longer suffice to satisfy due process. As stated in Schroeder v. City of New York, 371 U.S. 208, 212-13 (1962):

> The general rule that emerges from the Mullane [v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)] case is that notice by publication is not enough with respect to a person whose name and address are known or very

> easily ascertainable and whose legally protected interests are directly affected by the proceedings in question.

Recently, the Supreme Court held that constructive notice to a mortgagee who is identified in the public record does not satisfy due process requirements. Mennonite, 103 S.Ct. at 2711. The Court set forth how much notice was due:

> Since a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale. ... When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service. But unless the mortgagee is

not reasonably identifiable, constructive notice alone does not satisfy the mandate of Mullane.

Mennonite indicates that publication alone is constitutionally inadequate where an owner's address can readily be ascertained from public records. Where the holder of a mineral interest records such interest pursuant to 1983 Wisconsin Act 455, the holder's address can readily be ascertained by reference to the parcel of land above such interest in minerals. Sec. 706.057(7), Stats. By virtue of a recorded mineral interest, the holder possesses an interest in property protected by the due process requirements set forth in Mennonite. Thus, publication would be acceptable as notification to the holder of a recorded interest in minerals only if it were supplemental to other notices given by mail.

Under the present statutory scheme, the holder of an interest in minerals registered pursuant to 1983 Wisconsin Act 455 would not necessarily receive notice of tax delinquency proceedings other than by publication.

The notices required in various delinquent tax proceedings differ, e.g., see sections 75.12(1) and 75.521(3)(c), but only published notice of the time limit for redeeming specifically described lands sold for taxes is required in all such proceedings. Secs. 75.07 and 75.09, Stats.

Section 75.12 requires that, prior to issuance of a tax deed, written notice be "served upon the owner, or one of the owners of record in the office of register of deeds of the county wherein the land is situated." The owner is to be served personally or by mail. A tax title issued without strict compliance with the notice requirements of

section 75.12 would be void. Preston v. Iron County, 105 Wis.2d at 349, citing Potts v. Cooley, 51 Wis. 353, 355, 8 N.W. 153 (1881). However, section 75.12 requires only that one of the owners of record be notified. The holder of an interest in minerals registered pursuant to 1983 Wisconsin Act 455 would necessarily receive notice under the statute. See sec. 706.01(7m), Stats. In fact, Mennonite indicates that the Legislature should revise section 75.12 to provide written notice to the holder of a recorded interest in order to satisfy due process. It is no longer true, as was suggested in 39 Op. Att'y Gen. 595, 596 (1950), that notice served on one of the owners of record would suffice.

Under section 75.521(13)(b), a foreclosure judgment has the effect of the issuance of a tax deed. Leciejewski, 110 Wis. 2d at 347. The notice provisions of

section 75.521 require that the list of tax liens contain the name or names of the "last owner or owners ... as such ownership ... appears of record in the office of the register of deeds" of the county where property is located and that notice be mailed to those persons. Sec. 75.521(3)(a)2. and (c), Stats. The claim of the holder of an interest in minerals registered pursuant to 1983 Wisconsin Act 455 would appear in the office of the register of deeds. Such a holder is therefore an "owner" for purposes of section 75.521. In view of Mennonite, a county is required to mail notice of the foreclosure pursuant to section 75.521(3)(e) to the last-known address of such a mineral interest "owner" of record.

The answer to your final question concerning section 70.32(1) is that although the section is determinative of the

treatment of severed mineral interests in tax delinquency proceedings, the statute need not be viewed as at odds with the ownership of a mineral interest as a fee simple estate.

The assessment and taxation of a real estate parcel includes the assessment and taxation of standing timber and mineral interests in such parcel. Sec. 70.32(1), Stats. Thus, in the case of growing timber, it has long been held that such timber must be assessed to the landowner and that the sole means whereby the owner of the land can secure relief from the statutory assessment is by contract with the purchaser of the timber. Schmidt v. Almon, 181 Wis. 244, 194 N.W. 168 (1923). An agreement between the owner of the surface and the owner of the minerals underneath concerning the sharing of the real estate tax burden was likewise suggested in 25 Op. Att'y Gen. 630, 631

(1936). The last sentence of section 70.32(1) does provide that, for the years 1957 on, where a Wisconsin governmental unit has retained mineral rights, timber rights, etc., in real estate, the assessable value of such property shall be reduced by the value of the retained right and such retained interest shall be excepted in the assessment of the property. However, in all other cases, a tax deed or a judgment in a foreclosure in rem proceeding cuts off mineral interests in property which were taxable to the landowner. 49 Op. Att'y Gen. 130 (1960). Such mineral interests include those severed by separate conveyance as well as by reservation.

The foregoing notwithstanding, 1983 Wisconsin Act 455, enacted effective July 1, 1984, now appears to specifically recognize that interests in minerals may not only be separate from the surface of the land for

ownership purposes, but may also be separately treated for purposes of registration, assessment and taxation. Newly created section 706.057(2)(d) recognizes that a fee simple interest in minerals beneath the surface of the land may be preserved if "[p]roperty taxes are paid on the interest in minerals by the owner of the interest in minerals." Such language appears to accept a separate assessment and taxation of such interest in minerals, though it is not clear what existing statutory machinery is available to implement such separate treatment. For instance, while section 74.06 authorizes the local treasurer to "receive the tax on any part of any lot or parcel of land or on any undivided share of interest therein which the person paying the tax will clearly define," it is said that "such statute contemplates a separation only in such

instances where the same involve merely a matter of computation and not one of assessment ... ." Schmidt, 181 Wis. at 248-49. Therefore, while it may be that section 70.32(1) could not be read with section 706.057(2)(d) and interpreted as allowing for the separate assessment and taxation of any such fee simple interest in minerals beneath the surface of the land to the owner of such interest, statutory clarification and implementation by the Legislature is clearly in order.

STATE OF WISCONSIN:CIRCUIT COURT:RUSK COUNTY

STATE ex rel.,

CORNELL UNIVERSITY,

Plaintiff,

Case No. 90-CV-25

vs.

RUSK COUNTY,

Defendant.

BRIEF IN SUPPORT OF CORNELL UNIVERSITY'S MOTION FOR SUMMARY JUDGMENT

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* * * * *

V. IF THE STATUTES [§§ 70.32, 706.01(7m) AND 706.057] PERMIT THE ISSUANCE OF A TAX DEED TO EXTINGUISH A SEVERED MINERAL INTEREST, THEY ARE UNCONSTITUTIONAL.

The Wisconsin Supreme Court, in Chicago & N.W. Transp Co. v. Pedersen, 80 Wis. 2d 566, 259 N.W.2d 376 (1977), analyzed at length the constitutional issues raised by the then existing statutes which sought to regulate severed mineral interests. Prior to the Pedersen case, the Wisconsin legislature passed a statute which required the registration of severed mineral rights and the subsequent payment of an annual registration fee. Failure to record the registration or failure to pay the annual fee resulted in reversion of the severed mineral rights to the surface fee holder. The Wisconsin Supreme Court, in Pedersen, struck down that regulatory scheme as violative of the equal protection and due process clauses of the United States Constitution, and the uniformity of taxation clause of the Wisconsin Constitution. While this case presents a new statutory scheme

for the regulation of severed mineral interests, the constitutionality issues addressed in Pedersen remain.

A. Taking Without Just Compensation.

The instant case involves the potential taking by Rusk County of real property by a Tax Deed. That acquisition by Rusk County will become an asset for future sale to private or other governmental purchasers. In many similar cases a Tax Deed may be acquired by a private individual. In both instances, the ultimate purchaser of the real property will accede to the ownership of not only the surface fee but also of the mineral interests based upon the failure of the surface fee holder to pay applicable real property taxes. Such a procedure violates the long established constitutional principle that the legislature cannot take private property

from one person for the private use of another. See Pedersen, 80 Wis. 2d at 574, citing, Chicago & N.W.R. Co. v. Morehouse, 112 Wis. 1, 87 N.W. 849 (1901).

For example, in Bino v. Hurley, 273 Wis. 10, 76 N.W.2d 571 (1956), the plaintiff challenged an ordinance prohibiting owners of land surrounding a lake from bathing, boating or swimming in the lake as an unconstitutional taking. The Court held the ordinance to be outside the "limits of proper regulation" and a taking of property without due process and without compensation, in violation of the Fourteenth Amendment to the United States Constitution and the provisions of Art. I, Sec. 13 of the Wisconsin Constitution. Bino, 273 Wis. at 21-22. The consequences of the application of the statutory scheme in the present case are more egregious than the application of the ordinance in Bino. In Bino, a taking

resulted from prohibitions on use; here Cornell University is faced not only with a use restriction but a total loss of its real property interest.

It has long been Wisconsin law that interference with real property by the attempted exercise of the police power beyond what is a reasonable interference with private rights violates the constitutional prohibition against taking property without just compensation. Wisconsin Tel. Co. v. City of Milwaukee, 223 Wis. 251, 270 N.W. 336 (1937). Such a violation is present under the Attorney General's conclusion in 74 Op. Att'y Gen. 59 (1985) with respect to the interplay between the mineral rights statutes and the real property tax delinquency statutes.

A factual setting similar to that presented in this case, addressed under Montana law, illustrates the constitutional

concern. Lien v. Simons, 522 F. Supp. 712 (Mont. 1981), examined whether a Tax Deed purporting to convey mineral rights is effective against a prior reservation of mineral rights by deed. In Montana, minerals in place may not be taxed. Therefore, the Court noted, the Tax Deed would not convey the mineral rights since it represented a foreclosure only on the surface estate which came about because of a failure to pay taxes on the surface estate. The Court stated:

> "To make the title of the Grantor who reserves a mineral estate contingent upon the Grantee's timely payment of taxes is the equivalent of deprivation of due process of law and amounts to taking without just compensation."

Id. at 717. Wisconsin's present statutory scheme creates precisely the same result: Cornell University's title to its mineral interests is made contingent upon the surface fee holder's timely payment of real estate taxes. As concluded by the Lien court, such a situation is constitutionally unacceptable.

B. Procedural Due Process.

In Pedersen, the Court held §700.30, Stats., as it then existed, was unconstitutional, because its enforcement provisions denied procedural and substantive due process to severed mineral interest owners. Section 700.30, Stats., sets up a framework whereby those persons claiming rights to severed minerals had to record a claim to such minerals and pay an annual registration fee. Failure to record the mineral claim or pay the annual registration

fee resulted in the reversion of the severed mineral rights to the surface fee owner.

Plaintiff challenged the statute on procedural due process grounds. The Court noted:

> "Before a person may be deprived of property, that person has a right to a hearing. The requirements of the hearing will vary from case to case depending on the nature of the right or property threatened, but the hearing must allow for consideration of facts essential to the decision."

Pedersen, 80 Wis. 2d at 571, citing Bell v. Burson, 407 U.S. 535, 540-542 (1971). The Pedersen Court stated that, at the least, the severed mineral owner plaintiffs "must have a hearing where they can question the determination of the register of deeds that

the registration has not been done or that the real estate taxes have not been paid." Id. at 572. The Pedersen Court found that §700.30, Stats., did not provide for any procedural due process and therefore unconstitutionally allowed for the deprivation of property without due process.

The statutes which govern Rusk County's taking of a Tax Deed in this instance (§§ 75.14 and 75.521) do not provide for any procedural due process to Cornell University, the plaintiff mineral interest owner. Such mineral interest holders receive a Notice which advises that Rusk County may apply for a Tax Deed. However, there is no hearing providing an opportunity to question the issuance of such a deed or the non-payment of real estate taxes. Even if such a hearing was granted, the issue of non-payment of real estate taxes with respect to the surface estate is

essentially irrelevant. What is relevant to the severed mineral rights owner is what has been interpreted by the Attorney General to be the consequence of the taking of the Tax Deed -- the extinguishment of its mineral interests. The severed mineral rights owner has not been granted the opportunity to protect such interests. In order to preserve its severed mineral interests, such an owner must redeem the surface fee property through payment of the delinquent surface real property taxes. Such a requirement places an unreasonable burden, in that it requires the severed mineral rights owner to pay taxes on real property it does not own in an effort to protect its severed mineral interests.

The guarantees of procedural due process are significant:

> "The fundamental requisite of due process is affording a

> party whose rights may be affected by government action an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked."

Neylan v. Vorwald, 121 Wis. 2d 481, 488, 360 N.W. 2d 537 (1983). The statutory scheme [found in §§ 70.32(1), 75.14, and 75.521, Stats.] in place affords no proceedings adequate to safeguard the real property right in question and thus must be stricken as constitutionally infirm.

C. Substantive Due Process.

The Pedersen Court also dealt with a constitutional challenge based on substantive due process. The Pedersen plaintiffs argued that the forfeiture provisions of § 700.30, Stats., denied them

substantive due process as a result of unreasonable use of the police power. The test for a substantive due process violation and proper exercise of the police power is whether:

> "... the means chosen have a reasonable and rational relationship to the purpose or object of the enactment; if it has, and the object is a proper one, the exercise of the police power is valid."

Id., 80 Wis. 2d at 574, quoting State v. Jackman, 60 Wis. 2d 700, 705, 211 N.W.2d 480 (1973). Understandably, the legislature desired that the issuance of a Tax Deed result in the creation of a new chain of title -- a "fresh" start for the new owner. In keeping with this purpose, it makes sense to strip down the title to bare essentials. Section 75.14, Stats., however, recognizes

that some interests which affect title must remain intact. These include valid and enforceable restrictions and covenants running with the land.

As concluded by the Court in Doherty v. Rice, 240 Wis. 389, 3 N.W.2d 734 (1942), if an easement were cut off by a tax sale of the servient estate, the owner of the dominant estate would be deprived of his property without due process. Cornell University submits that the holding of the Doherty court is equally applicable to severed mineral interests. As illustrated above, these mineral interests are a separate real property interest. Any statutory scheme which extinguishes an independent fee simple real property interest for the purpose of ostensibly 'clearing-up' title to a separate fee simple real property interest is an overbroad exercise of a State's police power and

evinces no rational relationship between means and ends. "The Due Process Clause of the Fifth Amendment affords protection against arbitrary and irrational governmental action." Trane Co. v. Baldrige, 552 F. Supp. 1378 (W.D. Wis. 1983). In the instant case, the issuance of a Tax Deed that extinguishes severed mineral interests is precisely one of those statutory schemes that should be struck down as violative of substantive due process.

CONCLUSION

Through this case, Cornell University seeks to protect its real property interest in severed minerals in light of the operation of the statutes governing collection of delinquent real property taxes. This is precisely the type of case that should be resolved under the declaratory judgment provisions of §804.06, Stats. It presents a pure issue of law; and

the controversy is ripe for resolution. Cornell University respectfully submits that this Court should either declare that the rights of the holder of severed mineral interests are unaffected by tax delinquency proceedings arising out of the failure of the surface fee holder to pay real property taxes, or declare that the tax delinquency statutes governing Rusk County's ability to obtain a Tax Deed that would extinguish Cornell University's severed mineral interests to be unconstitutional.

Dated this 19th day of September, 1990.

MICHAEL, BEST & FRIEDRICH

By:/s/Jeffrey L. Abraham
Jeffrey L. Abraham

John A. Busch

Chris J. Trebatoski

Attorneys for Cornell University

COURT OF APPEALS OF WISCONSIN

DISTRICT III

STATE ex rel,

CORNELL UNIVERSITY,

Plaintiff-Respondent,

v. Case No. 91-0581

RUSK COUNTY,

Defendant-Appellant.

BRIEF & APPENDIX OF PLAINTIFF-RESPONDENT

APPEAL FROM JUDGMENT

OF THE HONORABLE F.A. HENDERSON

DATED DECEMBER 10, 1990

CIRCUIT COURT, RUSK COUNTY

Case No. 90-CV-25

MICHAEL, BEST & FRIEDRICH

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* * * * *

III. IF THE ISSUANCE OF A TAX DEED FOR FAILURE OF THE SURVIVE OWNER TO PAY REAL ESTATE TAXES EXTINGUISHES A SEVERED FEE SIMPLE INTEREST IN MINERALS, THEN THE STATUTORY SCHEME WHICH WORKS SUCH A RESULT IS UNCONSTITUTIONAL.

Assuming that the present statutory scheme results in a previously severed fee simple mineral interest being extinguished upon issuance of a tax deed, very serious constitutional issues are raised. The County has failed to address these issues.

The County's only attempt to address any of the constitutional concerns arising in this matter consists of the assertion that Cornell University has failed "to distinguish between the State's power to tax and the State's regulatory powers and power of eminent domain." County's Brief at 18.

The County cites authority for the proposition that if the State's power of taxation is properly exercised any taking of property resulting therefrom does not constitute a due process violation. Id. at 18-19. The County posits that the real issue is whether or not the State has properly exercised its power of taxation with respect to severed fee simple mineral rights. As long as it has, and since there is no exercise of the police powers or the power of eminent domain, then the State is immune from constitutional challenges based upon an unjust taking of property. Id. at 20.

The statutory scheme is not, contrary to the County's assertion, immune from due process challenges on the grounds that it constitutes a protected exercise of the State's taxing authority. It is true that the exercise of the taxing power generally

does not constitute a "taking" in the constitutional context. U.S. v. Frame, 658 F. Supp. 1476, 1479 (E.D. Pa. 1987). However, the exception to this rule arises

> "...in a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property; that is, a taking of the same in violation of the 5th Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion." Carr Staley, Inc. v. United States, 496 F.2d 1366, 1375 (5th Cir. 1974), quoting, Brushaber v. Union Pacific R.R., 240 U.S. 1, 24-25 (1915).

This is not a case where Cornell University is challenging the assessment of a tax on its real property as so burdensome that it amounts to an unjust taking. It is this type of challenge which typically fails due to the broad nature of the sovereign's taxing power. See, e.g., Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974). Indeed, Cornell University's complaint is that the taxing power was not properly exercised because its fee simple mineral interests were not taxed, yet it bears the consequences of the surface owner's failure to pay taxes on the surface fee interest. Moreover, a statutory scheme which results in the extinguishment of the severed mineral interests would clearly fall within the exception cited from the Carr Staley case as an act which does not constitute the exertion of taxation but rather amounts to a confiscation of property.

The constitutional issues raised in this case are significant and deserve thorough treatment. Some of these issues have been dealt with by the Wisconsin Supreme Court under a previous version of the mineral rights statutes. The Wisconsin Supreme Court, in Chicago & N.W. Transp. Co. v. Pedersen, 80 Wis. 2d 566, 259 N.W.2d 376 (1977), analyzed at length the constitutional issues raised by the then existing statutes which sought to regulate severed mineral interests. Prior to the Pedersen case, the Wisconsin legislature passed a statute which required the registration of severed mineral rights and the subsequent payment of an annual registration fee. Failure to record the registration or failure to pay the annual fee resulted in reversion of the severed mineral rights to the surface fee holder. The Wisconsin Supreme Court, in Pedersen,

struck down that regulatory scheme as violative of the equal protection and due process clauses of the United States Constitution, and the uniformity of taxation clause of the Wisconsin Constitution. While this case presents a new statutory scheme for the regulation of severed mineral interests, the constitutional issues addressed in Pedersen remain.

Under the statutory interpretation advocated by the County, the issuance of the tax deed to the County would result in the County taking title to the severed fee simple mineral interest and the fee simple interest in the surface estate. The County may then sell both real property interests to a third party. In many cases the real property may be acquired by a private individual. The ultimate purchaser of the real property will accede to the ownership of not only the surface fee but also of the

previously severed fee simple mineral interest based upon the failure of the surface fee holder to pay applicable real property taxes. Thus, the County has "taken" the severed fee simple mineral interest from the rightful owner, and sold it to another. Such a procedure violates that long-established constitutional principle that the legislature cannot take private property from one person for the private use of another. See, Pedersen, 80 Wis. 2d at 574, citing, Chicago & N.W.R. Co. v. Morehouse, 112 Wis. 1, 87 N.W. 849 (1901).

In Bino v. Hurley, 273 Wis. 10, 76 N.W.2d 571 (1956), the plaintiff challenged an ordinance prohibiting owners of land surrounding a lake from bathing, boating or swimming in the lake as an unconstitutional taking. The Bino Court held the ordinance to be outside the "limits of proper

regulation" and a taking of property without due process and without compensation, in violation of the Fourteenth Amendment to the United States Constitution and the provisions of Article I, §13 of the Wisconsin Constitution. Bino, 273 Wis. at 21-22. The consequences of the application of the statutory scheme in the present case could be more egregious than the application of the ordinance in Bino. In Bino, a taking resulted from prohibitions on use; here Cornell University is faced not only with a use restriction but a possible total loss of its real property interest. It has long been Wisconsin law that interference with real property by the attempted exercise of the police power beyond what is a reasonable interference with private rights violates the constitutional prohibition against taking property without just compensation.

Wisconsin Telephone Co. v. Milwaukee, 223 Wis. 251, 270 N.W. 336 (1936).

A factual setting similar to that presented in this case, addressed under Montana law, illustrates the constitutional concern. Lien v. Simons, 522 F. Supp. 712 (D. Mont. 1981), examined whether a tax deed purporting to convey mineral rights is effective against a prior reservation of mineral rights by deed. In Montana, minerals in place may not be taxed. Therefore, the Lien Court noted, the tax deed would not convey the mineral rights since it represented a foreclosure only on the surface estate which came about because of a failure to pay taxes on the surface estate. The Court stated:

> "To make the title of the Grantor who reserves a mineral estate contingent upon the Grantee's timely payment of taxes is the equivalent of deprivation

of due process of law and amounts to taking without just compensation." Id. at 717.

If the County's interpretation is adopted, Wisconsin's present statutory scheme would create precisely the same result: Cornell University's title to its fee simple mineral interests would be made contingent upon the surface fee holder's timely payment of real estate taxes. As concluded by the Lien court, such a situation is constitutionally unacceptable.

Extinguishment of the severed fee simple interest in minerals raises important due process concerns. In Pedersen, the Court held that §700.30, Stats. (1973), was unconstitutional, because its enforcement provisions denied procedural and substantive due process to severed mineral interest owners. Section 700.30, Stats., set up a framework whereby those persons claiming

rights to severed minerals had to record a claim to such minerals and pay an annual registration fee. Failure to record the mineral claim or pay the annual registration fee resulted in the reversion of the severed mineral rights to the surface fee owner.

In Pedersen, the plaintiff challenged the statute on procedural due process grounds. The Court noted:

> "Before a person may be deprived of property, that person has a right to a hearing. The requirements of the hearing will vary from case to case depending on the nature of the right or property threatened, but the hearing must allow for consideration of facts essential to the decision."

Pedersen, 80 Wis.2d at 571, citing Bell v. Burson, 402 U.S. 535, 540-542 (1971). The Pedersen Court stated that, at the least, the severed mineral owner plaintiffs "must

have a hearing where they can question the determination of the register of deeds that the registration has not been done or that the real estate taxes have not been paid." Id. at 572.

The Pedersen Court found that §700.30, Stats., did not provide for any procedural due process and therefore unconstitutionally allowed for the deprivation of property without due process.

The statutes which govern the County's taking of a tax deed in this instance do not provide for any procedural due process to Cornell University, the plaintiff fee simple mineral interest owner. The fee simple mineral interest owners receive a notice which provides that the County may apply for a tax deed. However, there is no hearing providing an opportunity to question the issuance of the tax deed or the non-payment of real estate taxes. Even if such a

hearing was granted, the issue of non-payment of real estate taxes with respect to the surface estate is essentially irrelevant to the owners of the severed fee simple mineral interests. What is relevant to the fee simple mineral interest owner is what has been interpreted by the Attorney General to be the consequence of the taking of the tax deed -- the extinguishment of its fee simple mineral interest. The severed fee simple mineral interest owner has not been granted the opportunity to protect such interests. In order to preserve its severed fee simple mineral interests, such an owner must redeem the surface fee property through payment of the delinquent surface real property taxes. Such a requirement imposes an unreasonable burden, in that it requires the severed fee simple mineral interest owner to pay taxes on real property it does

not own in an effort to protect its severed fee simple mineral interests.

The guarantees of procedural due process are significant:

> "The fundamental requisite of due process is affording a party whose rights may be affected by government action an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked."

Neylan v. Vorwald, 121 Wis. 2d 481, 488, 360 N.W.2d 537 (App. 1984). The statutory scheme presently in place affords no proceedings adequate to safeguard the real property right in question and thus must be stricken as constitutionally infirm.

The Pedersen Court also dealt with a constitutional challenge based on

substantive due process. The Pedersen plaintiffs argued that the forfeiture provisions of §700.30, Stats., denied them substantive due process as a result of unreasonable use of the police power. The test for a substantive due process violation and proper exercise of the police power is whether:

> "... the means chosen have a reasonable and rational relationship to the purpose or object of the enactment; if it has, and the object is a proper one, the exercise of the police power is valid." 80 Wis. 2d at 574, quoting State v. Jackman, 60 Wis. 2d 700, 705, 211 N.W.2d 480 (1973).

Understandably, the legislature desired that the issuance of a tax deed result in the creation of a new chain of title -- a "fresh" start for the new owner. In keeping with this purpose, it makes sense to strip

down the title to bare essentials. Section 75.14, Stats., however, recognizes that some interests which affect title must remain intact. These include valid and enforceable restrictions and covenants running with the land.

As concluded by the Court in Doherty v. Rice, 240 Wis. 389, 3 N.W.2d 734 (1942), if an easement were cut off by a tax sale of the servient estate, the owner of the dominant estate would be deprived of his property without due process. Cornell University submits that the holding of the Doherty Court is equally applicable to severed fee simple mineral interests. As established above, these mineral interests are a separate fee simple real property interest. Any statutory scheme which extinguishes an independent fee simple real property interest for the purpose of ostensibly "clearing-up" title to a separate

fee simple real property interest is an overbroad exercise of a State's police power and evinces no rational relationship between means and ends. "The Due Process Clause of the Fifth Amendment affords protection against arbitrary and irrational governmental action." Trane Co. v. Baldrige, 552 F. Supp. 1378 (W.D. Wis. 1983). A statutory scheme which provides that upon issuance of a tax deed for failure of a surface owner to pay real estate taxes, that severed fee simple mineral interests are thereby extinguished, is precisely one of those statutory schemes that should be struck down as violative of substantive due process.

CONCLUSION

This Court should uphold the Judgment of the Circuit Court and conclude as a matter of law that severed fee simple interests in minerals as defined under

§706.01(7m), Stats., are subject to separate taxation under §70.32, Stats., and further that issuance of a tax deed for failure of the surface fee owner to pay real estate taxes does not extinguish a severed fee simple mineral interest. In the event the Court concludes that, under the present statutory scheme, a tax deed issued to the County for failure of the surface estate owner to pay real estate taxes on the surface estate extinguishes a severed fee simple mineral interest, the Court should strike down such statutory scheme as unconstitutional, for the reasons set forth herein.

Dated this 16th day of September, 1991.

MICHAEL, BEST & FRIEDRICH

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SUPREME COURT OF WISCONSIN

No. 91-058

CORNELL UNIVERSITY,

Plaintiff-Respondent-Petitioner,

v.

RUSK COUNTY,

Defendant-Appellant-Respondent.

PETITION FOR REVIEW OF THE DECISION
OF THE COURT OF APPEALS, DISTRICT III,
DATED JANUARY 14, 1992

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* * * * *

II. IF THE ISSUANCE OF A TAX DEED BASED UPON FAILURE OF THE SURFACE FEE OWNER TO PAY REAL ESTATE TAXES EXTINGUISHES SEVERED MINERAL INTERESTS, THEN THAT STATUTORY SCHEME IS UNCONSTITUTIONAL.

The Court of Appeals spends a significant portion of its opinion justifying its conclusion that it is constitutional both on the basis of the State Constitution and the United States Constitution for the issuance of a tax deed to extinguish severed mineral interests. Throughout that lengthy discourse the Court of Appeals never addressed the single most important reason for the constitutionality argument. That being -- Is it constitutional to take a property right, in this case severed mineral interests, from an individual based upon the failure of another

person to pay taxes upon a separate and distinct property right? The Court simply dismissed that issue claiming that the complexities of collection of the taxes justified the "taking."

The Court of Appeals held:

> Cornell argues that the state is constitutionally required to assess each interest in the property separately and effect collection against each separate owner. The complexities and difficulties that accompany such a system were articulated by the Court in Schmidt. The timber rights on one piece of real estate might be owned by one person, while the mineral rights are owned by another, the water rights by another, and the surface land by another. The procedure set up by

> the state merely shifts the burden of allocating the proper share of taxes to the individual owners of a single piece of real estate. This system was designed to avoid the complexities that would exist if separate assessments against each interest were made. Because this procedure bears a reasonable and rational relationship to the enforcement of property tax collection, we conclude that the state is not constitutionally required to maintain the system suggested by Cornell.

Op., at 14, 15.

The Court of Appeals wholly misses the point. The current system of property taxation does not allocate the tax collection mechanism to the various holders of real property interests in a particular

parcel. It is crystal clear that if real property interests in one parcel of land are conveyed by, for example, an easement appurtenant to another piece of real property that such an easement cannot be extinguished by a tax deed issued with respect to the servient estate. Doherty v. Rice, 240 Wis. 389, 3 N.W.2d 734 (1942). The reason for that conclusion is that if the real property right of the holder of the dominant estate were to lose his or her interest based upon the failure of the servient estate to pay real property taxes the result would be an unconstitutional taking. Id., at 400. Since the easement is a burden on the servient estate and a benefit to the dominant estate the "full value upon private sale" direction of §70.32, Stats., requires that the easement reduce the tax value of the servient estate and increase the value of the dominant

estate. The servient estate is not taxed upon the easement and therefore the failure to pay such taxes does not result in the ability of the tax deed to extinguish the rights.

Thus, contrary to the Court of Appeals assertion, under the current system of assessment and taxation of real property, separated real property interests in a single parcel <u>are</u> currently taxed to the separate owners of those interests. The complexities of which the Court of Appeals complains are already mandated by the current taxation statutes as discussed in <u>Doherty</u>. The only appropriate distinction to be drawn between timber and minerals is the obvious one that the Court of Appeals chose to ignore. Severed mineral interests are different from timber rights. Severed mineral interests are the constitutional equivalent to property rights conveyed by an

easement. As such, the extinguishment of such rights by the issuance of a tax deed with respect to the failure of the surface fee holder's failure to pay property taxes is just as unconstitutional as the taking of an easement based upon the failure of the servient estate holder to pay taxes.

The Court of Appeals envisioned private allocation of the taxation cannot protect the property rights of the severed mineral interests holder. Even if a contract is entered for the allocation of taxes, under the Court of Appeals holding, the taxing authority is entitled to collect only from the surface fee holder and if that surface fee holder fails to pay taxes the existence of a contract for allocation would only provide a breach of contract action on behalf of the severed mineral interest holder. His or her property would be taken by the County in the event of non-payment of

taxes. The only mechanism available to protect the severed mineral interest holder is to pay taxes upon property that he or she does not own. Taxes which he or she has no standing to challenge and taxes of which he or she has no notice until after the tax deed has issued. The Court of Appeals' conclusion that such a procedure bears a "rational relationship to the proper governmental purpose" is unfathomable.

The extent to which the Court of Appeals addresses the constitutional concerns and the similar constitutionality issues analyzed by this Court in Doherty and Pedersen argue strongly in favor of this Court's review of the constitutionality issue presented. The public policy concerns involved and the constitutional issues presented are squarely within this Court's review and role. See §809.62(1)(a), Stats.

This Court should make that law, not the Court of Appeals.

CONCLUSION

Based upon the foregoing argument and authority, Cornell University respectfully submits that this Court should grant this petition and review the January 14, 1992 decision of the Court of Appeals District III.

Dated this 13th day of February, 1992.

Respectfully Submitted

MICHAEL BEST & FRIEDRICH,

/s/Chris J.Trebatoski

Jeffrey L. Abraham

John A. Busch

Chris J. Trebatoski

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLARA LIEN AND RICHLAND COUNTY, MONTANA,

Plaintiffs-Appellants,

vs.

KENNETH W. SIMONS AND EVA L. SPIES, heirs at law of Walter Simons and Hattie Simons, husband and wife, deceased; and SHELL OIL COMPANY, et al.,

Defendants and Third-Party Plaintiffs-Appellees,

vs.

No.81-3603

D.C. #CV 78-181-BLG

MEMORANDUM

CLARA LIEN: RICHLAND COUNTY, MONTANA, a body politic and corporate; GARFIELD N. SERVO AND NORMA SERVO, husband and wife;

PETER RANDALL SERVO AND MARILYN SERVO, husband and wife; NICHOLAS A. SERVO and CATHY SERVO, husband and wife; DOUGLAS B. SERVO, a single man; GAYLE S. HARP and WILLIAM HARP, wife and husband; SHARON A. WOODWORTH and ROBERT L. WOODWORTH, wife and husband; LYNDA SERVO EATON and THOMAS EATON, wife and husband, BERFLIOT MORSE and ALVIS L. MORSE, wife and husband,

Third-Party

Defendants-Appellants.

Argued and Submitted - October 5, 1982

Decided - December 29, 1982

Appeal from the United States District Court for the district of Montana, Billings Division Chief District Judge James F. Battin, Presiding

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Before: WALLACE, FARRIS and POOLE, Circuit Judges.

Clara Llien and Richland County et al. appeal the district court's grant of summary judgment to appellees Kenneth W. Simmons and Eva L. Spies in an action to determine ownership of the mineral estate of certain land located in Richland County, Montana. The court found that a deed conveying the fee, but reserving to the grantor the mineral rights, which was executed before the 1919 county taxes became a lien, but not recorded until afterwards, had effectively reserved the mineral estate, and was not afterwards subject to taxation or affected by a purported tax deed finally affected in 1932. Since minerals were not separately taxable, neither the tax lien nor the 1932 tax deed affected the state. We reverse and

find ownership of the mineral estate in the appellants.

Attachment of the statutory tax lien prior to the recordation of the Simous-Wortham conveyance charged the estate, including its mineral deposits before there arose an effective severance, and the subsequent tax deed therefore was effective to transfer the entire fee to the county and ultimately to appellant's predecessors in title.

Although the deed from Simons to Wortham conveying the fee but reserving the mineral rights was valid as between grantors and grantees as of the date of delivery on November 9, 1918, In Re Hume's Estate, 128 Mont. 223, 272 P.2d 999 (1954), the conveyance was not recorded until ten months later on September 13, 1919. Prior to the recordation of the conveyance and severance, taxes due in 1919 became a lien against the

property when assessed. By Montana statute, a lien attached and encumbered the property of record as of the first Monday in March, 1919. Section 2602 R.C.M. 1907(now, 15-16-403 M.C.A., 1979). At the time of the attachment, record title of the entire fee remained in Simons' name since the conveyance and reservation were not recorded and the zoning authorities had no notice of the purported severance. Since the lien attached before recordation, the tax lien had priority over the severance of the estate.

We think the interest of the state in the vital matter of raising and levying taxes, and the policy of the recording statutes combine to support the conclusion that an unrecorded conveyance of which the county is without knowledge does not on these facts operate to defeat the attachment

of the statutory lien, or the efficacy of a tax deed based on such a lien.

Lien/Richland County vs. Simons & Spies

Until severance, a fee simple includes the oil, gas and minerals located beneath the surface of the property. Stakes v. Tutvel, 134 Mont. 250, 255 328P.2d 1096(1958). therefore, the attached mineral estate was transferred along with the surface estate by the 1932 tax deed. Furthermore, the holding of Northern Pac. Ry. Co. v. Musselshell County, 54 Mont. 96, 106 169 P.53 (1917) that a severed mineral estate in place is not taxable, is not applicable here because both the taxable surface estate and the mineral estate (unrecorded and therefore nonsevered) were encumbered by the tax lien and thereafter transferred by the tax deed in 1932. We find ownership of the mineral estate in the appellants.

REVERSED.

WALLACE, Circuit Judge, dissenting:

The majority reverses the district judge's order granting summary judgment in an action to determine the ownership of a mineral estate under Montana law. The majority assumes the task of determining what the Montana courts would decide if presented with the case before us. In pursuit of this task, the majority weighs the "interest of the state in the vital matter of raising and levying taxes" and the policies underlying the Montana recording statutes.

We have held previously that we will accept a federal district judge's analysis of the law of the state in which he sits unless clearly wrong. E.g., Comacho v. Civil Service Commission, 666 F.2d 1257, 1262 (9th Cir. 1982); S.A. Empresa De Viacao Aerea Rio Grundense v. Boeing Co., 641 F.2d

746, 752 (9th Cir. 1981); C.R. Fedrick, Inc. v. Borg-Wagner Corp., 552 F.2d 852, 856 (9th Cir. 1977). Given that the proper interpretation and application of Montana law to the facts of this case is an extremely close question, I would affirm the district judge. His decision was not clearly wrong.

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